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**IN THE
COURT OF APPEALS OF INDIANA**

ERNEST SMITH,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 49A04-0612-CR-747
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable William Robinette, Commissioner
Cause No. 49G03-0609-FC-166239

September 7, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Ernest Smith appeals the sentence imposed by the trial court after he pleaded guilty to one count of auto theft as a class C felony.

We affirm.

ISSUE

Whether the sentence imposed is inappropriate.

FACTS

On September 1, 2006, Indianapolis Police Officer Jeremy Gates observed a 1993 Toyota and ran a random check on the vehicle's license plate. He learned that the vehicle had been reported stolen. He determined that the occupant in the driver's seat was Smith, who was in possession of the vehicle without the permission of the owner, Thomas Scott. Smith had a previous April 2006 conviction for auto theft.

On September 6, 2006, the State charged Smith with auto theft as a class C felony. Specifically, the State alleged that on September 1, 2006, Smith had "knowingly exert[ed] unauthorized control over the . . . 1993 Toyota of Thomas Scott, with intent to deprive Thomas Scott of the vehicle's value or use," and that Smith "had previously been convicted" of auto theft on April 3, 2006.¹ (App. 13, 15). On November 1, 2006, Smith and the State tendered to the trial court a written plea agreement whereby Smith would plead guilty as charged, and the sentence would be "left to the discretion of the court . . . with the stipulation that the executed portion shall not exceed six (6) years." (App. 28).

¹ The offense of auto theft "is a class C felony if the person has a prior conviction of" auto theft. Ind. Code § 35-43-4-2.5(b).

On November 17, 2006, Smith appeared before the trial court. Smith admitted to the trial court that on September 1, 2006, he had been in possession of the 1993 Toyota without the permission of the owner and had a previous conviction of auto theft. The trial court accepted Smith's guilty plea and entered judgment of conviction. The trial court proceeded to conduct sentencing. Smith confirmed the accuracy of the pre-sentence investigation report (PSI), but asked that it be amended to reflect his admission "that [he] took the van." (Tr. 13). Smith testified that "[he]'d like to apologize to the State, to the Court's [sic] and apologize to the victim, also." (Tr. 14). Smith's counsel noted that Smith's "several felony convictions" were "all D felonies," and this was "his first C felony conviction." *Id.* His counsel then asked the trial court to consider as mitigating circumstances "the fact that he has pled guilty and . . . has shown remorse here today." *Id.*

Noting that it had read the PSI, the trial court stated as follows in imposing Smith's sentence:

. . . this is a class C felony. He has a number of class D felony convictions. I'm not going to go over all of them but I'm going to mention some of them, just so they recognize what we do at sentencing. So, his misdemeanors, I'm going to leave alone for right now. On July 7th, '92, he has a Theft, D, but was sentenced as alternative; on January 4th, '93, he has a class D felony, Attempted Theft conviction; on April 30th '93, he has a Theft conviction, a class D felony; and on July 13th, '94, a Theft, a class D felony; November 14th, '97, a class D felony; May 21st, '98, class D felony, and then there are others but those I will mention for the purpose of this hearing.

(Tr. 15-16). The trial court then sentenced Smith to a six-year term at the Department of Correction, with one year suspended and served on probation.

DECISION

Smith reminds us that the six-year sentence imposed is an enhanced sentence, two years more than the advisory sentence.² Smith's argument that the six-year sentence is inappropriate is twofold: first, that the trial court failed to find that his remorse and guilty plea were mitigating circumstances, and second, that it is not warranted based upon the nature of the offense and his character. We cannot agree.

Sentencing decisions rest within the sound discretion of the trial court and are reviewed only on appeal for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007). The trial court must enter a statement explaining its "reasons or circumstances for imposing a particular sentence." *Id.* at 491. A trial court abuses its discretion if "the record does not support the reasons" given by the trial court, "omits reasons that are clearly supported by the record and advanced for consideration" at sentencing, "or the reasons given are improper as a matter of law." *Id.* at 490, 491.

Here, the trial court stated that it had considered Smith's lengthy criminal record revealed in the PSI -- noting the existence of numerous misdemeanor convictions and expressly reciting six specific D felony convictions. The trial court's reason is clearly supported by the record. Further, the defendant's criminal history is a proper aggravating factor, especially where, as here, the "gravity, nature and number of prior offenses" is so closely related to the instant offense. *Bryant v. State*, 841 N.E.2d 1154, 1156-57 (Ind.

² "A person who commits a Class C felony shall be imprisoned for a fixed term of between two (2) and eight (8) years, with the advisory sentence being four (4) years." I.C. § 35-50-2-6(a).

2006). Thus, that reason is not “improper as a matter of law.” *Anglemyer*, 868 N.E.2d at 491.

Smith argues that the trial court erred in failing to find his remorse and his guilty plea to be mitigating circumstances. The trial court need only identify mitigating circumstances that it finds to be significant, and if the trial court does not find the existence of a mitigating factor after it has been argued by counsel, the trial court is not obligated to explain why it has found that the factor does not exist. *Anglemyer* 868 N.E.2d at 493. Smith cites to *Francis v. State*, 817 N.E.2d 235, 238 (Ind. 2004), to assert that he “deserves” to have his guilty plea found to be a mitigating circumstance. In *Francis*, Indiana’s Supreme Court held that the trial court erred “in not considering” the guilty plea as a mitigating circumstance. *Id.* Further, more recently our Supreme Court has stated that “a defendant who pleads guilty deserves to have some mitigating weight extended to the guilty plea in return.” *Cotto v. State*, 829 N.E.2d 520, 525 (Ind. 2005) (emphasis added). Thus, neither *Cotto* nor *Francis* mandated that the trial court find a defendant’s guilty plea a significant mitigating circumstance when imposing sentence. Therefore, we do not find that the trial court abused its discretion when it did not expressly find Smith’s guilty plea to be a mitigating circumstance.³

³ The better practice for a sentencing court is to always express whether it finds or does not find mitigating circumstances. Both *Cotto* and *Francis* teach us that a guilty plea, in most circumstances, deserves some consideration of mitigation by the trial court. Nevertheless, we believe the record in this case clearly supports the sentence imposed, and it would not be a good use of judicial resources to remand this case to the trial court to simply have it expressly state that Smith’s guilty plea is not a significant mitigating circumstance under the facts here.

As to Smith's argument that the trial court erred when it did not find his remorse to be a mitigating circumstance, our Supreme Court has held that the trial court's determination of a defendant's remorse is similar to a determination of credibility. *Pickens v. State*, 767 N.E.2d 530, 534-535 (Ind. 2002). Without evidence of some impermissible consideration by the trial court, we accept its determination of credibility. *Id.* The trial court is in the best position to judge the sincerity of a defendant's remorseful statements. *Stout v. State*, 834 N.E.2d 707, 711 (Ind. Ct. App. 2005), *trans. denied*. Smith does not allege any impermissible considerations. Thus, the trial court did not abuse its discretion by failing to consider Smith's alleged remorse to be a significant mitigating factor.

Finally, Smith argues that his sentence is inappropriate in light of the nature of the offense and his character. Indiana's Constitution authorizes independent appellate review of the sentence imposed by the trial court. *Anglemyer*, 868 N.E.2d at 491 (citing IND. CONST., art. IV, §§ 1, 6). This appellate authority is implemented through Appellate Rule 7(B), which provides that the appellate court "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." *Id.* The appealing defendant "must persuade" the appellate court that his sentence "has met the inappropriateness standard of review." *Id.* at 494.

Smith reminds us that the offense was charged as a C felony offense based upon his previous conviction for auto theft. However, the evidence before the trial court revealed that Smith had multiple previous convictions of theft wherein property was

stolen from vehicles. This would reasonably suggest that the seriousness of Smith's criminal behavior with respect to vehicles was escalating. As to his character, Smith notes his offenses were "non-violent" and asserts that he "is not the 'worst of the worst.'" Smith's Br. at 7. However, the trial court did not impose the maximum enhancement of four years -- but only enhanced his sentence by two years. Further, we find that the length of Smith's history of anti-social behavior (virtually without pause since 1986), his numerous convictions, and his inability to successfully complete alternatives to incarceration at the Department of Correction reflect a character without respect for the laws of society. Smith has failed to persuade us that his sentence is inappropriate.

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.